

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 646 (Sub-No. 1)

SIMPLIFIED STANDARDS FOR RAIL RATE CASES

Decided: January 22, 2007

By a decision in this proceeding served on July 28, 2006 (July 2006 decision), the Board proposed to revise its procedures for “determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case” under 49 U.S.C. 10701(d)(3). Specifically, the Board proposed to: (1) create a simplified stand-alone cost (Simplified-SAC) procedure to use in medium-size rate disputes for which a full stand-alone cost (Full-SAC) presentation is too costly, given the value of the case; (2) retain the “Three-Benchmark” method of Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996), with certain modifications and refinements, for small rate disputes for which even a Simplified-SAC presentation would be too costly, given the value of the case; and (3) establish eligibility presumptions to distinguish between large, medium-size, and small rail rate disputes. Opening comments were submitted on September 29, 2006, reply comments on November 30, 2006, and rebuttal comments on January 11, 2007.

A hearing on this matter is scheduled for January 31, 2007. Parties may address any issue raised in the public comments, although parties should be mindful that the Board has studied the public comments in depth. To focus the hearing, parties are invited to address the following issues raised in the public comments, but parties need not address every issue set forth below. The Board will leave the record open until February 26, 2007, to allow parties the opportunity to submit supplemental comments on issues raised in this notice and at the hearing.

- **Eligibility**

In the original simplified guidelines, the Board elected not to adopt a bright-line test to determine who might use the guidelines. Proponents had suggested various tests, based on the tonnage in dispute, the value of remedy available, or the size of the complaining shipper. The Board was reluctant to adopt any test that might inadvertently sweep in a case with a value that could justify a Full-SAC presentation. Based on subsequent comments received in two public proceedings, the Board was persuaded that further guidance on who may use the simplified guidelines was needed and appropriate.

The Board therefore proposed eligibility presumptions based on the maximum value of a case. This proposal was designed to offer a simple, objective calculation based on the level of the challenged rates, the volume of traffic at issue, and the variable cost of the movements. The Board noted that under this proposal, without hiring industry experts, an aggrieved shipper could calculate the maximum value of its case and determine which rate method would be presumed to apply. The overarching purpose of the proposed presumptions was to offer clearer guidance as to who may expect to qualify to use a simplified approach, and to provide captive shippers with small disputes some practical means of challenging the reasonableness of their rail rates.

Three measures were proposed, however, to prevent manipulation of this eligibility standard. First, the Board proposed to limit the duration of rate relief to 5 years to encourage complainants with relatively stable origin-to-destination traffic patterns to present a Full-SAC case rather than seek the short-term relief available under the simplified guidelines. Second, the Board proposed to curtail the scope of rate relief to the volume of traffic identified by the complainant at the outset. Finally, the Board proposed an aggregation rule to prevent a complainant from breaking a large dispute into numerous smaller rate cases to qualify for simplified treatment.

The shipper community submitted extensive testimony that this approach would not achieve the desired goal of providing access to the rate complaint process. In particular, they argue that the eligibility standard should be focused on the actual value of a case rather than the maximum value, so as not to leave shippers without a forum to bring rate complaints. They also raise concerns that the aggregation proposal would transform these guidelines for small disputes into guidelines only available for small shippers.

The railroads have countered with a suggestion that a shipper could specify what it believes the maximum value of the case to be and to limit its recovery to that stipulated value. In this fashion, the Simplified-SAC and Three-Benchmark methods would be available to any shipper, but with a limit on the total relief available. Shippers expressed concern that a complainant would lack the information needed to make a binding stipulation before filing its complaint.

Parties are invited to address whether the following modification of the carriers' suggestion would address the concerns of both the shippers and the railroads. Building on the sort of "small claims" model suggested by the railroads, a complainant would be free to select the methodology under which it wanted the rate to be judged: (1) Full-SAC; (2) Simplified-SAC; or (3) Three-Benchmark. However, a limit on the rate relief available under each method would be imposed. So rather than trying to prejudge the merits of a particular case and calculate the actual value of the case, the Board could rely on the shipper to make that assessment, and instead simply put a limit on the total relief available under the Simplified-SAC and the Three-Benchmark approaches. To address the concern raised by shippers about a lack of information, the Board could permit a complainant to amend its complaint any time up to the filing of opening evidence. As such, if a complainant realized more (or less) was at stake than originally anticipated, the complainant would not be prejudiced and could elect to pursue relief under the more appropriate standard for the magnitude of the dispute. Under this modification, each shipper would be free to select the methodology best suited for its dispute.

In addressing this possible “small-claims” approach, parties are invited to comment on the following related issues:

- Aggregation. Whether the Board should abandon its aggregation proposal at this time, but retain discretion to address circumstances on a case-by-case basis if it found that any particular complainant was disaggregating a larger dispute into a number of small disputes in order to manipulate the agency’s processes.
- Litigation Costs:
 1. Whether the Board has overestimated the reasonable, expected costs to litigate a Full-SAC case in light of reforms adopted in Ex Parte No. 657 (Sub-No. 1); and
 2. Whether the Board has underestimated the reasonable, expected costs to litigate a Simplified-SAC case, assuming no rerouting of issue traffic.
- Arkansas Electric Cooperative Corporation Suggestion: AECC proposed that the eligibility formula should provide for use of the Simplified-SAC up to the point where the value of the case is less than or equal to the expected SAC litigation costs of both parties combined. It argues that below this level, any required use of Full-SAC would be guaranteed to consume resources greater than the total amount at issue in the dispute. Parties are invited to address this suggestion and whether, if the Board were to adopt the “small claims” approach described above, the limit on relief for disputes resolved under the Simplified-SAC should be set at twice the cost for a shipper to litigate a Full-SAC, and for disputes resolved under the Three-Benchmark approach at twice the cost for a shipper to litigate a Simplified-SAC.

- **Simplified-SAC Proposal**

- Three-Tier Approach: The statute directs the Board to create a procedure for “determining the reasonableness of challenged rail rates in those cases in which a *full* stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. 10701(d)(3) (emphasis added). The Union Pacific Railroad argues that the proposed Simplified-SAC would satisfy this directive. Interested Shippers¹ contend that the Congressional directive requires a wholly different alternative to SAC. Parties are invited to address this debate, the statutory language noted above, and the historical context in which the provision was enacted.
- Routing of Issue Traffic: Railroads suggest the Board further simplify the Simplified-SAC proposal by precluding an analysis based on a different routing than the predominant route actually used for the issue traffic. They present evidence on the time and cost savings from their modification. Parties should address whether the reduction in litigation expenses warrants this variation from Full-SAC methodology.

¹ Interested Shippers, who filed joint comments, include the American Chemistry Council, American Forest and Paper Association, American Soybean Association, Colorado Wheat Administrative Committee, The Fertilizer Institute, Glass Producers Transportation Council, Idaho Barley Commission, Idaho Wheat Commission, Institute of Scrap Recycling Industries, Montana Wheat and Barley Committee, National Association of Wheat Growers, National Barley Growers Association, National Corn Growers Association, National Council of Farmers Cooperatives, National Farmers Union, National Grain and Feed Association, National Sorghum Producers, The National Industrial Transportation League, National Oilseed Processors Association, National Petrochemical & Refiners Association, Nebraska Wheat Board, North American Millers Association, North Dakota Grain Dealers Association, North Dakota Public Service Commission, North Dakota Wheat Commission, Oklahoma Wheat Commission, Paper and Forest Industry Transportation Committee, PPL EnergyPlus, LLC, South Dakota Wheat Commission, Texas Wheat Producers Board, USA Rice Federation, Washington Wheat Commission, Alliance for Rail Competition, and Consumers United for Rail Equity.

- **Three Benchmark Approach**

- Ratcheting: Railroads argue that broad reliance on a formulaic Three-Benchmark approach would remove the link to the SAC test and would not address the “ratcheting” concerns raised by the D.C. Circuit in McCarty Farms over the use of an average to judge the reasonableness of a particular rate.² Parties are invited to address whether the Board may use the Three-Benchmark approach, as modified in the notice, once it has exhausted all reasonable means of simplifying a SAC presentation.
- Equal Access to Unmasked Waybill Sample: Interested Shippers note that a railroad has access to unmasked revenue information for its own traffic, while the proposal would deny such information to the complainant. Parties are invited to address whether the need to protect the confidential contract information outweighs concerns created by the information asymmetry, and whether the agency’s standard protective order would adequately protect the confidential contract data in the Waybill Sample.
- RSAM: To comport with differential pricing notions, many railroads urge the Board to continue to calculate the RSAM figure by focusing only on the revenue needed from potentially captive traffic (i.e., traffic where revenues are more than 180% of variable costs), rather than all traffic, to earn adequate revenues. Parties are invited to address this argument and to also address the concern cited in the decision, see July 2006 decision at 23 n.41, that without access to the *unmasked* Waybill Sample, parties would have no means of independently verifying the current RSAM and R/VC_{>180} calculations.
- Non-Defendant Traffic: Railroads urge the Board to exclude non-defendant movements from the comparison traffic. Parties are invited to address this suggestion.

- **Mediation**

- The parties are invited to address whether the Board should adopt the suggestion for a 20-day mandatory, non-binding mediation period at the commencement of any case.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

² See Burlington N. R.R. v. ICC, 985 F.2d 589, 597 (D.C. Cir. 1993) (“If the formula is employed regularly and repeatedly, it will reduce rates to the lowest R/VC used in the comparison group.”).

It is ordered:

This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary